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JURISPRUDENCE AND LEGAL THEORY

LEGAL PHILOSOPHY OF

JEROME FRANK

&

OLIVER WENDELL HOLMES JR.

CONTENTS

NAME	Pg. No.
1. INTRODUCTION	4 & 11
2. HISTORY	5 & 15
3. CASE LAWS	18

Chapter I

Introduction

Jerome New Frank born on 10th September 1889 –January 13, 1957) Born in ,New York City, Frank's parents were Herman Frank and Clara New Frank, descendants of mid 19th . century German Jewish immigrants . Frank 's father also an attorney, relocated to the family of Chicago in 1896, He studied in Chicago at Hyde Park High School, before receiving Bachelor's Degree from the university of Chicago in 1909. Frank obtained his Law Degree from the University of Chicago Law School in 1912, He had a highest grades in the school's history Frank worked as a secretary to reformist Chicago alderman Charles Edward Merriam. He worked as a Lawyer in private practice in Chicago from 1912 to 1930 specializing in corporate reorganizations, and becoming a partner in the firm in 1919. He was a Legal Philosopher and author who played a leading role in the legal realism movement, a chairman of the securities Exchange Commission, and federal appellate judge of the United States Court of Appeals for Second Circuit

Chapter II

Entry into writing and academia.

In 1930 after having undergone six months of psychoanalysis, Frank published *Law and the Modern Mind*, which proposed that Judicial decisions were primarily motivated by the influence of psychological factors on the individual judge. The book “dropped like a bombshell on the legal and academic world”, quickly becoming “a Jurisprudential bestseller” which was widely noticed as well as criticized” Frank moved to New York city where he practised until 1933, also working as a research associate at Yale Law School in 1932, where he collaborated with Karl Llewellyn, and feuded with legal idealist Roscoe Pound. In addition to the philosophical disagreements arising from Frank’s realism and Pound’s idealism, Pound accused Frank of misattributing quotes to him in *Law and the modern mind* writing to Llewellyn.

Llewellyn defended Frank, but Pound would not relent. This led Frank to produce a lengthy memorandum showing where each quote attributed to Pound Frank could find in Pound’s writing, and offering to pay to hire someone to verify the citations. Pound would continue to attack Frank’s legal philosophy throughout his life, although Frank later moderated his views on legal realism.

Executive Branch Service

During the new deal administration of President Franklin D. Roosevelt, Frank sought the assistance of Felix Frankfurter to secure a position with the administration. Frank was initially offered the position of Solicitor of the United States Department of Agriculture, but this appointment was blocked by the senator James A. Farley, who favoured for another candidate for that job. Frank was then appointed as general counsel of the Agricultural

Adjustment Administration in 1933 and soon become embroiled in an internal struggle with the agency's head, George N. Peek, who tried to exercise complete control over the agency. Peek resigned in December 1933, and Frank continued to serve until February 1935, when he was purged along with young leftist lawyers in his office. Roosevelt approved the purge, but made Frank a special counsel to the Reconstruction Finance Association in 1935.

Frank returned to private practice in New York from 1936 to 1938 with the firm of Greenbaum, Wolff and Ernst. In 1937 William O Douglas recommended that Roosevelt appoint Frank to be a commissioner of the Securities and Exchange Commission, which Douglas then chaired, Roosevelt agreed, and Frank served as an SEC commissioner from December of 1937 until 1941 and was elevated to chairman from 1939 to 1941, when Douglas was appointed to the United States Supreme Court. While serving in the SEC, Frank also served on the Temporary National Economic Committee Frank also published a book titled 'Save America First' which had been written during his return to private practice and advocating against the American involvement in the stirring conflict in Europe. However, Frank recanted those views after the attack on Pearl Harbor, and Roosevelt forgave Frank's isolationism

On February 13, 1941, Roosevelt named Frank as a Judge of the United States Court of Appeals for the Second Circuit, to a seat vacated by Robert Porter Patterson. Frank was confirmed by the Senate in March 1941, and received commission on March 27, 1941. Frank was considered a highly competent judge, often taking that as perceived as the moral liberal position on civil liberties issues. In addition to his reputation for expertise on civil liberties matters, he was also considered to be "an outstanding judge in the field of procedure, finance, and criminal law". For a time, he was sharply and vocally at odds with a colleague on the bench, Charles Clark, "over a whole range of common law precepts"

Frank's scholarly tendency bled over in to his judicial opinions some of which were notoriously lengthy. One anecdote relayed about his aspect of Frank's work tells of law clerk who had no objected to the length of one Frank's opinions. According to the story He spent all of a week and finally cut it down from sixty five pages to one-half page. He left both on Judge Frank rushed in to his clerk's office and shouted, Bully for you ,displaying the clerk's work.

As a judge, Frank wrote the opinion in February 1952 affirming the convictions of Julius and Ethel Rosenberg who had been convicted of Conspiracy to commit espionage. In reviewing the case as part of a three Judge panel, Frank rejected each of the Rosenberg's arguments on appeal. Frank denied that the death penalty imposed on the Rosenberg's was cruel and unusual punishment, but privately he had advised trial Judge Irving Kaufman not to sentence the Rosenberg's to death. In his opinion he also suggested that the Supreme Court might want to revisit the questions about the death penalty for crime similar to treason.

In a related case, however, Frank dissented from his two colleagues by voting to grant a new trial to an accused third conspirator, Morton Sobell. The Jury, according to Frank, should have been permitted to decide whether sobell had joined the other conspirators in their plan to send atomic information from Los Alamos to the Soviets, or had merely engaged in a separate, less significant conspiracy with Julius Rosenberg to transmit non-atomic information.

Chapter III

United States V. Roth¹

In *United States v. Roth*, Frank wrote a concurring opinion to the decision, which affirmed the obscene conviction of criminal defendant. In a lengthy appendix to his concurring opinion, Frank drew on a host of historical literacy and social science studies to point to the dangers and contradiction of all forms of Government censorship of ideas and images. The case was affirmed by the United States Supreme Court the following year in *Roth v. United States*, which noted Frank's approach. The concurrence has been asserted to be one of Frank's most important opinions, and on which set the stage for the direction the Supreme Court would take on such issues beginning in the 1960s.

Frank's Judicial service did not stem his scholarly output. In 1942, he published *If Men were Angels*, a defence of the ambitious New Deal Programs, and governmental regulation in general, expressing views that he developed while serving in the SEC. In 1945, he published *Fate and Freedom*, which attacked the theoretical underpinnings of Marxism, denying that societies followed any strict progression and insisting that people were free to mould the development of their own society. Beginning in 1946, Frank also began teaching a regular course on legal fact finding at Yale Law School which "emphasized the parts that human fallibility and partisanship play in the trial court processes" In 1949 he published his most significant work after *Law and the Modern Mind*, this being *Courts on Trial*, which stressed the uncertainties and fallibility of the Judicial process. In 1951 he moved from New York city to New Haven, Connecticut, preferring to live closer to Yale. His last book, *Not Guilty* was written with his daughter, and published following his death. The book concerned specific cases of people who had been wrongfully convicted crimes.

¹ Internet Wikipedia the free encyclopedia.

Personal Life

Frank died in 1957 of a heart attack in New Haven . His extensive personal and Judicial papers are archived at Yale university and are most open to researchers .Frank had published many influential books, including *Law and Modern Mind* (1930), which argues for 'legal realism' and emphasizes the psychological forces at work in legal matters. In 1965, his daughter Barbara Frank Kristein published *A Man's Reach: The selected writings of Judge Jerome Frank*, with foreword by William O. Douglas and in introduction by Edmond Cahn of New York university school of Law. At least one legal commentator has written that "Few jurisprudential writers have aroused such prolonged public controversy as Jerome Frank"

Frank preferred to call himself a "Constructive Legal Sceptic" rather than a realist. He insisted that there were really two groups of realists "rule sceptics" and "fact sceptics". "According to Frank a legal decision is the result of the application of a rule of law to the facts as found by the Judge."

According to Frank, the craving for certainty and guidance which men seek in the Law may stem, in part at any rate, from the yearning for security and safety which is an inescapable legacy of childhood.

In his book *Law and the modern mind*, Frank emphasized the fact that law is not certain. "Certainty of Law is a legal myth." It is the "father complex which makes a man to think in terms of the certainty of Law.

OLIVER WENDELL HOLMES, JR.

Chapter I

Introduction

Oliver Wendell Holmes, Jr. (March 8, 1841 – March 6, 1935) was an American jurist who served as an Associate Justice of the Supreme Court of the United States from 1902 to 1932, and as Acting Chief Justice of the United States January–February 1930. Noted for his long service, his concise and pithy opinions and his deference to the decisions of elected legislatures, he is one of the most widely cited United States Supreme Court justices in history, particularly for his "clear and present danger" opinion for a unanimous Court in the 1919 case of *Schenck v. United States*, and is one of the most influential American common law judges, honoured during his lifetime in Great Britain as well as the United States. Holmes retired from the Court at the age of 90 years, 309 days, making him the oldest Justice in the Supreme Court's history. He also served as an Associate Justice and as Chief Justice on the Massachusetts Supreme Judicial Court, and was Weld Professor of Law at the Harvard Law School, of which he was an alumnus.

Profoundly influenced by his experience fighting in the American Civil War, Holmes helped move American legal thinking towards legal realism, as summed up in his maxim: "The life of the law has not been logic; it has been experience." Holmes espoused a form of moral skepticism and opposed the doctrine of natural law, marking a significant shift in American jurisprudence. As he wrote in one of his most famous decisions, his dissent in *Abrams v. United States* (1919), he regarded the United States Constitution as "an experiment, as all life is an experiment" and believed that as a consequence "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and

believe to be fraught with death. During his tenure on the Supreme Court, to which he was appointed by President Theodore Roosevelt, he supported efforts for economic and advocated broad freedom of speech under the First Amendment. These positions as well as his distinctive personality and writing style made him a popular figure, especially with American progressives, despite his deep cynicism and disagreement with their politics. His jurisprudence influenced much subsequent American legal thinking, including judicial consensus supporting New Deal regulatory law, and influential schools of pragmatism, critical legal studies, and law and economics. He was one of only a handful of justices to be known as a scholar; The Journal of Legal Studies has identified Holmes as one of the three most cited American legal scholars of the 20th century.

Chapter II

Early life

Holmes was born in Boston, Massachusetts, the son of the prominent writer and physician Oliver Wendell Holmes, Sr. and Abolitionist Amelia Lee Jackson. Dr. Holmes was a leading figure in Boston intellectual and literary circles, Mrs. Holmes was connected to the leading families; Henry James Sr., Ralph Waldo Emerson and other Transcendentalists were family friends. Known as "Wendell" in his youth, Holmes, Henry James Jr. and William James became lifelong friends. Holmes accordingly grew up in an atmosphere of intellectual achievement, and early formed the ambition to be a man of letters like Emerson. While still in Harvard College he wrote essays on philosophic themes, and asked Emerson to read his attack on Plato's idealist philosophy. Emerson famously replied, "If you strike at a king, you must kill him." He supported the Abolitionist movement that thrived in Boston society during the 1850s. At Harvard University, where he was a member of a dining club, the Porcellian Club to which his father had also belonged, and the Hasty Pudding club, of which he was secretary and "poet." He enlisted in the Massachusetts militia in the spring of 1861, when the president first called for volunteers following the firing on Fort Sumter, but returned briefly to Harvard College to participate in commencement exercises. In the summer of 1861 with his father's help he obtained a lieutenant's commission in the Twentieth Massachusetts Volunteer Infantry. Holmes's early life was described in detail by Mark De Wolfe Howe, *Justice Oliver Wendell Holmes--The Shaping Years, 1841-1870* (1957).

During his senior year of college, at the outset of the American Civil War, Holmes enlisted in the fourth battalion, Massachusetts militia, and then received a commission as first lieutenant in the Twentieth Regiment of Massachusetts Volunteer Infantry. He saw much action, from the Peninsula to the Wilderness, suffering wounds at the Battle of Ball's Bluff, Antietam, and Chancellorsville, and suffered from a near-fatal case of dysentery. Holmes particularly admired and was close to his fellow officer in the 20th Mass., Henry Livermore Abbott. Holmes rose to the rank of lieutenant colonel, but eschewed promotion in his regiment and served on the staff of the Sixth Army during the Wilderness campaign. Abbott took command of the regiment in his place, and was killed. Holmes is said to have shouted at Lincoln to take cover during the Battle of Fort Stevens, although this is commonly regarded as apocryphal. Although Holmes himself made this claim, he likely was not present on the day Lincoln visited Fort Stevens. Holmes received a brevet (honorary) promotion to colonel in recognition of his services during the war. He retired to his home in Boston after his three-year enlistment ended in 1864, weary and ill, his regiment disbanded.

Legal career

Lawyer and State Judge

In the summer of 1864, Holmes returned to the family home in Boston, wrote poetry and debated philosophy with his friend William James, pursuing his debate with philosophic idealism, and considered reenlisting. But by the fall, when it became clear that the war would soon end, Holmes enrolled in the Harvard Law School, "kicked into the law" by his father, as he later recalled. He attended lectures there for a single year, reading extensively in theoretical works, and then clerked for a year in his Cousin Robert Morse's office. He was admitted to the bar in 1866, and after a long visit to London, to complete his education, went into law practice in Boston. He joined a small firm, and in 1872 married a childhood friend, Fanny Bowditch Dixwell. Their marriage lasted until her death on April 30, 1929. They never had children together. They did adopt and raise an orphaned cousin, Dorothy Upham. Fanny Holmes disliked Beacon Hill society, and devoted herself to embroidery. She was described as devoted, witty, wise, tactful, and perceptive.

He formed his closest intellectual friendships with British men, and became one of the founders of what was soon called the "sociological" school of jurisprudence in Great Britain, followed a generation later by the "legal realist" school in America.

Holmes practiced admiralty law and commercial law in Boston for fifteen years. It was during this time that he did his principal scholarly work, serving as an editor of the new Harvard Law Review, reporting decisions of state supreme courts, and preparing a new edition of Kent's Commentaries, which served practitioners as a compendium of case law, at a time when official reports were scarce and difficult to obtain. He summarized his hard-won understanding in a series of lectures, collected and published as *The Common Law* in 1881.

Holmes famously contrasted his own scholarship with the abstract doctrines of Christopher Columbus Langdell, dean of Harvard Law School, who viewed the common law as a self-enclosed set of doctrines. Holmes viewed Langdell's work as akin to the German philosophic idealism he had for so long resisted, opposing it with his own scientific materialism.

Holmes was considered for a federal court judgeship in 1878 by President Rutherford B. Hayes, but Massachusetts Senator George Frisbie Hoar convinced Hayes to nominate another candidate. In the fall of 1882, Holmes became a professor at Harvard Law School, accepting an endowed professorship which had been created for him, largely through the efforts of Louis D. Brandeis. On Friday December 8, 1882, Supreme Judicial Court of Massachusetts associate justice Otis Lord decided to resign, however, giving outgoing Republican governor John Davis Long a chance to appoint his successor, if it could be done before the Massachusetts Governor's Council adjourned at 3 pm. Holmes' partner George Shattuck proposed him for the vacancy, Holmes quickly agreed, and there being no objection by the Council, took the oath of office on December 15, 1882. His resignation after only a few weeks, and without notice, was resented by the law school faculty, giving rise to persisting estrangement. On August 2, 1899, Holmes became Chief Justice of the Massachusetts Supreme Judicial Court following the death of Walbridge A. Field.

During his service on the Massachusetts court, Holmes continued to develop and apply his views of the common law, usually following precedent faithfully. He issued few constitutional opinions in these years, but carefully developed the principles of free expression as a common-law doctrine. He departed from precedent to recognize workers' right to organize trade unions and to strike, as long as no violence was involved, and coercion

was not exerted through impermissible means such as secondary boycotts, stating in his opinions that fundamental fairness required that workers be allowed to combine to compete on an equal footing with employers. He continued to give speeches and to write articles that added to or extended his work on the common law, most notably "Privilege, Malice and Intent", in which he presented his view of the pragmatic basis of the common-law privileges extended to speech and the press, which could be defeated by a showing of malice, or of specific intent to harm. This argument would later be incorporated into his famous opinions concerning the First Amendment. He also published an address, "The Path of the Law,"^[18] in which he enlarged upon his view of the law from the perspective of a practitioner concerned for the interests of his client, who might be a bad man unconcerned with moral absolutes.

Chapter III

Supreme Court Justice

On August 11, 1902, President Theodore Roosevelt nominated Holmes to a seat on the United States Supreme Court vacated by Justice Horace Gray, who had retired in July 1902 as a result of illness. The nomination was made on the recommendation of Senator Henry Cabot Lodge, the junior senator from Massachusetts, but was opposed by the senior senator and chairman of the Senate Judiciary Committee, George Frisbie Hoar. Hoar was a strenuous opponent of imperialism, and the legality of the annexation of Puerto Rico and the Philippines was expected to come before the Court. Lodge, like Roosevelt, was a strong supporter of imperialism, which Holmes was expected to support as well. As a result of Hoar's opposition, there was a delay in the vote for confirmation, but on December 2, 1902, Roosevelt resubmitted the nomination and Holmes was unanimously confirmed by the United States Senate on December 4, receiving his commission the same day. On the bench, Holmes did vote to support the administration's position favoring the annexation of former Spanish colonies in the "Insular Cases." However, he later disappointed Roosevelt by dissenting in *Northern Securities Co. v. United States*, a major antitrust prosecution; the majority of the court, however, did rule against Holmes and sided with Theodore Roosevelt's belief that Northern Securities violated the Sherman Anti-Trust Act. The dissent by Holmes permanently damaged his formerly close relationship with Theodore Roosevelt.

Holmes is known for his pithy, short, and frequently quoted opinions. In more than twenty-nine years on the Supreme Court bench, he ruled on cases spanning the whole range of federal law. He is remembered for prescient opinions on topics as widely separated as copyright, the law of contempt, the antitrust status of professional baseball, and the oath required for citizenship. Holmes, like most of his contemporaries, viewed the Bill of Rights as codifying privileges obtained over the centuries in English and American common law, and was able to establish that view in numerous opinions of the Court. He is considered one of the greatest judges in American history, and embodies for many the traditions of the common law, which are now challenged by Originalists who insist the text of the Constitution trumps any common law precedents that depart from the original understanding of its meaning.

CASE LAWS²

Otis v. Parker

Beginning with his first opinion for the Court, in *Otis v. Parker*, Holmes declared that "due process of law," the fundamental principle of fairness, protected people from unreasonable legislation, but was limited to only those fundamental principles enshrined in the common law and did not protect most economic interests.

² Internet Wikipedia the free encyclopedia

Schenck v. United States³

In a series of opinions surrounding the WWI Espionage Act of 1917 and the Sedition Act of 1918, he held that the freedom of expression guaranteed by federal and state constitutions simply declared a common-law privilege for speech and the press, even when those expressions caused injury, but that privilege would be defeated by a showing of malice, or intent to do harm. Holmes came to write three unanimous opinions for the Supreme Court that arose from prosecutions under the 1917 Espionage Act because in an earlier case, *Baltzer v. United States*, he had circulated a powerfully expressed dissent, when the majority had voted to uphold a conviction of immigrant socialists, who had circulated a petition criticizing the draft. Apparently learning that he was likely to publish this dissent, the Government (perhaps alerted by Justice Louis D. Brandeis, newly appointed by President Woodrow Wilson) abandoned the case, and it was dismissed by the Court. The Chief Justice then asked Holmes to write opinions in which they could be unanimous, upholding convictions in three similar cases, where there were jury findings that speeches or leaflets were published with an intent to obstruct the draft, a crime under the 1917 law. Although there no evidence that the attempts had succeeded, Holmes held for a unanimous Court that an attempt, purely by language, could be prosecuted in cases where the expression, in the circumstances in which it was uttered, posed a "clear and present danger" of causing some harm that the legislature had properly forbidden. In *Schenck v. United States*, Holmes announced this doctrine for a unanimous Court, famously declaring that the First Amendment could not be understood to provide an absolute right, and would not protect a person "falsely shouting fire in a theater and causing a panic." Although much criticized, *Schenck* remains an important precedent, and still governs cases in which expressions are intended to cause harm, or threaten to cause imminent lawless conduct.

³ [Internet Wikipedia the free encyclopedia](#)

Abrams v. United States

Later that year, however, in ⁴Abrams v. United States, Holmes was again in dissent. The Wilson Administration was vigorously prosecuting those suspected of sympathies with the recent Russian Revolution, as well as opponents of the war against Germany. The defendants in this case were socialists and anarchists, recent immigrants from Russia who opposed the apparent efforts of the United States to intervene in the Russian civil war. They were charged with violations of the 1918 amendments to the Espionage Act which were known as the Sedition Act of 1918, and which purported to make criticisms of the government and the war effort a crime. Abrams and his co-defendants were charged with distributing leaflets that in Yiddish called for a "general strike" to protest the US intervention in Russia. A majority of the Court voted to uphold the convictions and sentences of ten and twenty years, to be followed by deportation. Holmes was moved to dissent. The majority claimed to be following the precedents already set in Schenck and the companion cases in which Holmes had written for the Court, but Holmes insisted that the defendants' leaflets neither threatened to cause any harm, nor showed the specific intent to hinder the war effort. Holmes condemned the Wilson Administration's prosecution, and its insistence on draconian sentences for the defendants in passionate language: "Even if I am technically wrong [regarding the defendants' intent] and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper . . . the most nominal punishment seems to be all that possibly could be inflicted, unless the defendants are to be made to suffer, not for what the indictment alleges, but for the creed that they avow. . . ." Holmes then went on to explain the importance of freedom of thought in a democracy. In writing this dissent, Holmes may have been influenced by Zechariah Chafee's article "Freedom of Speech in War

⁴ Internet Wikipedia the free encyclopedia.

Time". Chafee had criticized Holmes's opinion in Schenck for failing to express in more detail and more clearly the common-law doctrines upon which he relied. In his Abrams dissent, Holmes did elaborate somewhat on the decision in Schenck, roughly along the lines that Chafee had suggested. Although Holmes evidently believed that he was adhering to his own precedent, some later commentators accused Holmes of inconsistency, even of seeking to curry favor with his young admirers. In Abrams, the majority opinion did rely on the clear-and-present-danger formulation of Schenck, claiming that the leaflets showed the necessary intent, and ignoring the point that they were unlikely to have any effect. In later opinions, the Supreme Court departed from this line of reasoning where the validity of a statute was in question, adopting the principle that a legislature could properly declare that some forms of speech posed a clear and present danger, regardless of the circumstances in which they were uttered. Holmes continued to dissent.

Buck v. Bell⁵

In 1927, Holmes wrote the 8-1 majority opinion in the Buck v. Bell case that upheld the forced sterilization of Carrie Buck who was claimed to be mentally defective. although later scholarship has shown the suit was collusive, and Carrie Buck was probably of normal intelligence, the record before the Supreme Court showed only that she had received a proper hearing in which she was represented by a competent guardian, and was able to press her suit in the federal courts. She apparently had received the procedures required by due process of law in ample measure. The argument made on her behalf was principally that the statute requiring sterilization of institutionalized persons was unconstitutional, itself a violation of what today we call "substantive due process." Holmes repeated familiar arguments that

⁵ Internet Wikipedia the free encyclopedia.

statutes would not be struck down if they appeared on their face to have a reasonable basis. In support of his argument that the supposed science of eugenics provided a reasonable basis for the law, and that interest of the states in a pure gene pool outweighed the interest of individuals in their bodily integrity, he argued:

From Taft's departure on February 3, 1930 until Charles Evans Hughes took office on February 24, 1930, Holmes briefly acted as the Chief Justice and presided over court session.

Although Holmes did not dissent frequently, and wrote only 72 separate opinions out of about 1400 written during his 29 years of service, his dissents were often prescient and had acquired so much authority that he became known as "The Great Dissenter"

Jurisprudential Contributions

Critique of Formalism

Holmes in his earliest writings established a lifelong belief that the decisions of judges were consciously or unconsciously result-oriented, and reflected the evolving mores of the class and society from which judges were drawn. Holmes accordingly argued in *The Common Law* that legal rules are not deduced through formal logic but rather emerge from active process of human-self government. He explored these theories in his 1881 book *The Common Law*. His philosophy represented a departure from the prevailing jurisprudence of the time: legal formalism. Holmes sought to consciously reinvent the common law—to modernize it as a tool for adjusting to the changing nature of modern life, as judges of the past had done more or less unconsciously.^[28] He has been classed with the philosophic pragmatists, although pragmatism is what he attributed to the law, rather than his personal philosophy. Supporting this connection is his brief membership in the informal Metaphysical Club which met in the 1870s, and included Henry and William James, and the philosopher Charles Peirce.

Central to his thought was the notion that the law, as it had evolved in modern societies, no longer concerned itself with morality, but with the material results of a defendant's actions. Holmes argued that the evolving common law standard was that liability be based on the conduct that society expects the "reasonable and prudent man" to exercise. If a construction worker throws a beam onto a crowded street.

In the modern world, the advances made in biology and the social sciences should allow a better conscious determination of the results of individual acts and the proper measure of culpability for them. The proper object of law, Holmes argued, was not to instill individual morality through punishment, but rather to publicize social duties to give individuals a fair chance to avoid doing harm before being held responsible for it. This belief in the pronouncements of science, although he later doubted its applicability to law in many cases, accounts for his enthusiastic endorsement of eugenics in his writings, and his opinion in the case of *Buck v. Bell*.

Legal Positivism

Justice Holmes laid the foundation of healthy and constructive skepticism in the law. Hughes writes: "Though another half century was to elapse before the appearance of Ogden and Richards' *The Meaning of Meaning*, exploration of meaning of meaning of law was Holmes's pioneer enterprise." Hughes further writes: "To me, Mr. Justice Holmes is a prophet of the Law."

In 1881, Holmes published *The Common Law*, representing a new departure in legal philosophy. Through his writings, he changed general attitude to the law. An excerpt from the opening passage captures the pragmatic theme of that work and of Holmes's philosophy of law: "The life of the law has not been logic; it has been experience."

In a dissenting opinion in *Lochner v. New York* (1905) Holmes declared that the law should develop along with society and that the 14th Amendment did not deny states a right to experiment with social legislation. He also argued for judicial restraint, asserting that the Court should not interpret the Constitution according to its own social philosophy.

According to Holmes, "Men make their own laws...these laws do not flow from some mysterious omnipresence in the sky, and...judges are not independent mouthpieces of the infinite. The common law is not a brooding omnipresence in the sky." Holmes compared the Law to a bad man "who cares only for the material consequences of things" rather than as an independent moral entity. Holmes defined the law in accordance with his pragmatic judicial philosophy. Rather than a set of abstract, rational, mathematical, or in any way unworldly set of principals, Holmes said that, "[T]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Accordingly, Holmes thought that only a judge or lawyer who is acquainted with the historical, social, and economic aspects of the law would be in a position to fulfill his functions properly. Although he never ruled on the contentious social issue, Holmes believed the concept justified abolishing segregation.

As a justice of U.S. Supreme Court, Holmes challenged a traditionalist concept of the Constitution that said that the written document does not change, so neither should its interpretation. Holmes also protested against Formalism, the method of abstract logical deduction from general rules in the judicial process. According to Holmes, lawyers and judges are not logicians and mathematicians. The books of the laws are not books of logic and mathematics. He writes, "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges

share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

Holmes also insisted on the separation of "ought" and "is," which are obstacles in understanding the realities of the law. As a moral skeptic, Holmes stated that if you want to know the real law, and nothing else, you must consider it from the point of view of a "bad man" who cares only of the material consequences of the courts' decisions, and not from the point of view of a good man, who find his reasons for conduct "in the vaguer sanctions of his conscience." The law is full of phraseology drawn from morals, and talks about rights and duties, malice, intent, and negligence - and nothing is easier in legal reasoning than to take these words in their moral sense. Holmes said, "I think our morally tinted words have caused a great deal of confused thinking." But Holmes is not unconcerned with moral questions. He writes, "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law." George Washington University law professor Jeffrey Rosen summarized Holmes' views on politics and the law this way: "Holmes was a cold and brutally cynical man who had contempt for the masses and for the progressive laws he voted to uphold."

Retirement, and legacy

Holmes was widely admired during his last years, and on his ninetieth birthday was honoured on one of the first coast-to-coast radio broadcasts ,during which the Chief Justice, the Dean of Yale Law School, and the president of the American Bar Association read encomia; the Bar Association presented him with a gold medal. Holmes served on the court until January 12, 1932, when his brethren on the court, citing his advanced age, suggested that the time had come for him to step down. By that time, at 90 years of age, he was the oldest justice to serve in the court's history. On his ninety-second birthday, newly inaugurated President Franklin Delano Roosevelt and his wife Eleanor called on Holmes at his house in Washington.

Holmes died of pneumonia in Washington, D.C. in 1935, two days short of his 94th birthday. In his will, Holmes left his residuary estate to the United States government. After his death, his personal effects included his Civil War Officer's uniform still stained with his blood and 'torn with shot' as well as the carefully wrapped Minié balls that had wounded him three times in separate battles. He was buried in Arlington National Cemetery. The United States Postal Service honoured Holmes with a Prominent Americans series (1965–1978) 15¢ postage stamp.

Holmes's papers, donated to Harvard Law School, were kept closed for many years after his death, a circumstance that gave rise to somewhat fanciful accounts of his life. Catherine Drinker Bowen's fictionalized biography "Yankee from Olympus" was a long-time bestseller, and the 1951 Hollywood motion picture *The Magnificent Yankee* was based on a play that had little basis in fact. Much of the scholarly literature addressing Holmes's opinions was written before much was known about his life, and before a coherent account of his views was available. The Harvard Law Library eventually relented, and made available to scholars the extensive Holmes papers,

carefully collected and annotated by Mark De Wolfe Howe, who unfortunately died before he was able to complete his own biography of the justice. In 1989, the first full biography based on Holmes's papers was published, and several other biographies have followed. Congress established the "Holmes Devise" and the funds he left to the United States were used to create a garden at the Supreme Court's building, and to publish an edition of his collected works.

THE LIFE OF THE LAW

According to Holmes law must be strictly distinguished from morals. A lawyer is concerned with what the law is and not with what it ought to be. He felt that the development of law could be Justified Scientifically.

Holmes accepted the possibility of scientific valuation in law. His view of law as "Prediction" placed both litigation and the professional lawyers in the centre of the legal stage.

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